

**STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE  
45 Fremont Street 21<sup>st</sup> Floor  
San Francisco, CA 94105**

**RESPONSES TO PUBLIC COMMENTS**

**PAY-DRIVE (USAGE BASED AUTO INSURANCE) REGULATION**

**File No. REG-2008-00020**

**September 2, 2009**

This document contains common responses of the California Department of Insurance (CDI) to comments submitted by members of the public regarding this regulation. The underlined headings at the beginning of each response are intended as a guide to the subject matter of the response.

This regulation included three public comment periods. The first public comment period followed the Notice of Proposed Action and Notice of Public Hearing issued on September 5, 2008. The second and third public comment periods followed 15 day notices of modifications to the text of the regulation issued on June 24, 2009, and July 31, 2009. Comments submitted during each of the three public comment periods are summarized in one of the following documents:

- (1) Summary of and Response to the Written and Oral Public Comments in Response to Public Notice Issued September 5, 2008,
- (2) Summary of and Response to Written Public Comments in Response to 15 Day Notice of Modifications to Text of Proposed Regulations Issued on June 24, 2009, and
- (3) Summary of and Response to Written Public Comments in Response to 15 Day Notice of Modifications to Text of Proposed Regulations Issued on July 31, 2009.

This document should only be read in conjunction with one of the three companion documents listed above. The responses in the companion summary documents refer the reader to various of the responses “A” through “BB” below.

- A. Generally Supports PAYD Regulation -- This comment generally supports the proposed pay-as-you-drive insurance regulation.
- B. Considered and Rejected -- The Department has considered this comment and determined not to adopt the suggested change(s) at this time.

- C. Vague/Unclear/Inconsistent -- This comment is vague or the intention and/or request being made in the comment is unclear or it is internally inconsistent.
- D. Mileage Verification List Expanded and Clarified/Reporting Frequency Not Mandated -- The original version of the regulation only permitted three methods for verifying mileage in a mileage verification program. Some commenters encouraged the Department to expand this list by varying amounts. In some cases, commenters encouraged the Department to allow any reasonable method. The Department agrees that the list needed to be expanded but also believes that there needs to be some controls on the methods that are allowed to be used. The final version of proposed CCR § 2632.5(c)(2)(F)(i) includes an expanded list of the five methods for verifying mileage in a mileage verification program. These include (1) odometer readings taken by an agent of the insurer, (2) records of an automotive repair shop, (3) smog check data, (4) odometer readings taken by the insured and self-reported by the insured, (5) technological devices. In addition, under CCR § 2632.5(c)(2)(F)(i)6 an insurer can request to be able to use another method but cannot actually use any other method until after the Commissioner has the opportunity to review and approve it. No unlisted method for verifying mileage can be used until after the Commissioner approves the method.

The regulations require the insurer to specify one or more of the verification methods listed in § 2632.5(c)(2)(F)(i) in its class plan for mileage verification programs. If the insurer specifies more than one method, the insured may be able to choose among the specified methods.

The Department does not believe it is necessary to mandate the frequency of mileage reporting in a mileage verification program.

GPS devices are not permitted to track location information for insurance purposes. However this regulation does not preclude the use of GPS devices for purposes of providing emergency road service, theft service, map service or travel service.

- E. Comment Requests Action Beyond Scope of Regulation -- This comment suggests changes or requests actions that are beyond the scope of this regulation, or is directed to a portion of CCR § 2632.5 or another CCR section that is not affected by this regulation.
- F. Recommendation Adopted -- The Department has amended the regulations in a manner that substantially incorporates this comment in whole or in part.

- G. No Specific Recommendation or Request -- This comment does not propose any specific changes to the regulations.
- H. Combining Mandatory Factors with Optional Factors/Disaggregation/Adequate Public Notice Provided -- The Department has amended the regulation to allow an insurer which offers a verified mileage program to combine certain optional rating factors with the second mandatory factor. Specifically, the following optional rating factors can be combined in the verified mileage program: Percent Use, Academic Standing, Gender, Marital Status, and Driver Training. The permitted combining of factors with the second mandatory factor is similar to the way that insurers can currently combine optional factors with the third mandatory factor under CCR § 2632.5(e).

The Department understands that some members of the industry oppose the disaggregation provision in existing § 2632.5(e) as well as the new disaggregation provision. However, the Department believes that it is preferable to retain the disaggregation provisions in this regulation. All factors that are combined as permitted in § 2632.5(e) and in § 2632.5(c)(2)(F)(viii) must be disaggregated to assure they remain consistent with CIC § 1861.02.

With regard to combining optional factors with the third mandatory rating factor, this regulation will not expand the list of optional factors listed in existing CCR § 2632.5(e).

With regard to combining optional factors with the second mandatory rating factor, this regulation only includes those optional factors that are already permitted to be combined with the third mandatory factor. Further, this regulation only allows combining of factors for mileage verification programs specifically allowed under the original text of this regulation. This change does not impact any existing program or any traditional mileage estimation policies or programs. Therefore, the Department believes that the changes are sufficiently related to the text of the original proposal so that the public had ample notice of these changes. This view is supported by a review of the Notice of Proposed Action which specified that “potential changes to CCR § 2632.5 governing the other rating factors are expressly within the scope of this notice.”

- I. Conflicts With Take All Comers Provision of CIC § 1861.02 (b)(1) -- The suggested change to the regulations may conflict or interfere with the take all comers provision of CIC § 1861.02 (b)(1).
- J. Unnecessary and/or Involves Unnecessary Complications -- The Department believes that the proposal or recommendation is unnecessary and/or would

likely unnecessarily complicate, impede, and/or delay the implementation of these regulations.

- K. Prescribed Mileage Bands Rejected -- The regulation as originally proposed in September 2008, did not refer to mileage bands. Some commenters encouraged the Department to add mileage bands to the regulation. On June 24, 2009, CDI published a revised version of the regulation that added a provision regarding mileage bands. That provision required insurers to use at least eight mileage bands in any verified mileage program. Some commenters subsequently expressed the view that the mileage bands were too restrictive. Others questioned the grounds for the specific proposed mileage bands. Others thought the Department should impose more mileage bands and narrower mileage bands.

In the amendments released for public comment on July 31, 2009, the Department removed the mileage band requirement. The purpose of a mileage verification program is to calibrate premium more closely to miles driven than typically now occurs. One of the reasons a consumer is likely to choose a mileage verification program is because they do not want to pay to insure their car for more miles than they drive. Accordingly, a mileage verification program that does not include numerous mileage bands is unlikely to draw consumers. Therefore, the Department expects that insurers which offer verified mileage programs will choose to use multiple mileage bands. Allowing insurers to select their own mileage bands should also result in mileage bands that are actuarially sound for the insurer.

Linear pricing not required: – While the regulation allows insurers to price miles in linear fashion, the regulation does not require linear pricing. This allows insurers to price miles used in different mileage bands correctly from an actuarial point of view. For example if an insurer actuarially shows that the cost per mile of insuring a low mileage driver is higher than the cost per mile of insuring a high mileage driver, the insurer may price insurance accordingly.

- L. CDI Assuring that Miles Driven Remains Second Most Important ARF -- CIC § 1861.02 mandates that the number of miles driven annually is the second most important rating factor for every automobile policy issued in California. The regulations allow certain optional rating factors to be combined with the second mandatory factor. However, the regulations assure that the second mandatory rating factor retains its status as the second most important rating factor by requiring any combined factors be disaggregated when calculating factor weights.

- M.1. No New Rating Factors -- The existing CCR sections do not include any auto rating factors that track specific driving behaviors or “Quality-of-Miles” factors such as acceleration and deceleration patterns, time of day, speed, location, or number of right and left turns. The proposed amendments do not include any new rating factors. Additional rating factors for driving behaviors and Quality-of-Miles driven are beyond the scope of this regulation.
- M.2. Other Rating Factors Not Affected -- Some commenters have expressed concern that new verified mileage programs and policies permitted by this regulation will allow insurers to avoid applying the three mandatory rating factors in the order required by CIC § 1861.02. This is not the case. Under Proposition 103, every automobile class plan filed in the state of California, including any class plan that includes a verified mileage aspect pursuant to this regulation, must apply the three mandatory rating factors in the statutorily mandated sequence. Further, this regulation does not prohibit insurers from applying approved optional rating factors as well as the three mandatory rating factors. The main difference between the policy issued under this regulation and a standard automobile policy is that the second mandatory factor (miles driven) will be verified as opposed to estimated.
- M.3. No Mileage Only Policies -- Some commenters have urged the Commissioner to permit mileage-only policies. As stated in response M.2, Proposition 103 requires that the three mandatory rating factors apply to all automobile policies issued in California. These regulations do not attempt to change this statutory requirement and do not permit rates to be based only on mileage.
- N.1. Privacy --The Department’s regulations at 10 CCR §§ 2689.12 – 2689.20 set forth standards for safeguarding nonpublic personal information, and are applicable to data collected by onboard technology and other means.
- N.2. CIC § 791.04 requires insurers to provide notice as to the type and source of personal information collected.
- N.3. CIC § 791.04 requires insurers to provide notice regarding the type and source of information collected. CIC § 791.13 sets forth requirements regarding disclosure of information. Because the law addresses these issues, it is unnecessary to include similar language in these regulations.
- N.4. Although it is alleged that allowing access to Bureau of Automotive Repair data will have a considerable impact on the automobile repair shops which are small businesses, there is no indication as to why the commenter believes this is the case. The regulation does not change the information which is reported to the Bureau of Automotive Repair in connection with the smog

program. The language regarding estimating of annual miles driven is currently found in existing regulation § 2632.5(c)(2)(E).

- N.5. Because Annual Miles Driven is the second mandatory rating factor, those who drive less will generally pay lower insurance premiums. Information about the number of miles a policyholder actually drives will allow an insurer to provide more options for consumers to choose from.
- N.6. The comment is correct that insurers can, from the list set forth in the regulations, choose the method(s) by which they allow their policyholders to verify miles driven.
- N.7. Insurers are responsible for the security of policyholders' information, whether or not a vendor is involved, and various laws govern the security of policyholder information. For example, CIC § 791.14 allows the Commissioner to examine and investigate licensees to ensure compliance with the privacy laws. CCR §§ 2689.2, 2689.12 – 2689.20, and 2689.24 also govern information security.
- N.8. CIC § 791.02(s) defines “personal information” and that definition applies to the information described in these regulations. Regulations are not necessary to repeat statutory provisions.
- N.9. As with current mileage estimation methods, and other options available in connection with insurance transactions, insurers can determine their own business plans. Various laws ensure that insurers do not conduct business in a deceptive manner, and insurers have an incentive to ensure that policyholders understand how they will be required to verify mileage.
- N.10. The regulations do not allow a technological device to be used to monitor driver behavior or for general rate calculation purposes.
- N.11. The case of *Walker v. Allstate* (2000) 77 Cal.App.4th 750 recognized the right of the Commissioner to engage in case by case determinations. That process is open to public inspection.
- N.12. § 2643.5(c)(2)(F)(ii) recognizes that, in a verified actual mileage program, the policyholder may be charged more or less, either in the just-concluded policy period, or in the upcoming policy period, based upon the miles the policyholder actually drove during the policy period. The insurer must notify the policyholder before the effective date of the policy that it intends to adjust the policy premium to reflect the actual miles driven, if that is the case.
- N.13. Proposition 103 established annual miles driven as the second mandatory rating factor. Insurers currently rate based upon estimated annual miles, and the Commissioner anticipates that many will continue to do so once these regulations take effect. Other insurers, including new market entrants, may

decide to adopt a verified actual mileage only business plan. This is in keeping with the intent of Proposition 103, which was to create a competitive insurance market. The regulations are clear. § 2632.5(c)(2)(F) states that an insurer may offer a verified actual mileage program instead of, or in addition to, an estimated mileage program.

- N.14. The regulations do not allow insurers to collect driver behavior information or to continuously monitor and report back about drivers. Information which an insurer may collect and use is limited and prescribed.
- N.15. This section permits combining of some additional existing optional rating factors with the Secondary Mandatory Rating Factor. This section does not relate to any additional driver behavior which it is alleged the regulations authorize insurers to collect.
- N.16. The regulation authorizing insurers to use technological devices that accurately collect vehicle mileage information became operative in February 2007.
- N.17. The regulations allow four methods by which mileage may be verified through odometer readings. However, some policyholders may prefer to purchase insurance from an insurer obtaining mileage information directly through a technological device. For example, a policyholder may have an automobile that is not subject to the smog check requirements, may not want to drive to an agent's office to have the vehicle's odometer reading recorded, and may prefer not to contact the insurer to report odometer readings. The proposed regulations allow that policyholder to choose to have odometer readings automatically reported to the insurer.
- N.18. Similar to insurers who make their products available only through the internet, some insurers may want to develop a business model whereby they verify miles by means of a technological device only. Consumers have the option to do business with other insurers if they prefer to verify mileage through odometer readings rather than a technological device.
- N.19. Other than location information in connection with additional services requested by consumers, such as roadside assistance services, the only information which may be collected by a technological device is actual miles driven. To the extent information about the location of the insured vehicle is collected in connection with services such as roadside assistance services, that information is protected by various privacy laws, including California Insurance Code §§ 791, *et seq.*, and the Department's privacy regulations.
- N.20. § 2632.5(c)(2)(F)(5)(a) allows an insurer to use a technological device (a) only to collect the number of miles a policyholder drives annually and (b) only for premium rating purposes. Under this regulation, an insurer may not

use a technological device to collect information about a driver, a driver's behavior or characteristics, or the vehicle. Because of the numerous issues involved in territorial rating, as reflected in *Spanish Speaking Citizens' Foundation, Inc., v. Low* (2000) 85 Cal.App.4th 1179, the regulation specifically prohibits use of a technological device to collect or store information about the location of the insured vehicle. At the same time, subsection (b) recognizes that insurers and motor clubs provide other services at the request of the policyholder, such as emergency roadside services, and vehicle location is essential in order to provide those services. Therefore, the regulation provides that an insurer or motor club may use a technological device to collect location information as part of an emergency road service, theft service, map service, or travel service. Nevertheless, nothing in this section allows an insurer to collect any information other than the number of miles a policyholder drives annually for rating purposes. Information about the location of a vehicle may be collected only as specifically set forth in this section, and not for rating purposes.

- O. No Mandate: Mileage Verification Program Not Required -- Some commenters have urged the Department to make mileage verification and/or pay-as-you-drive programs mandatory. Some commenters, including privacy advocates, want the programs to be optional and want mileage estimation programs to continue to be available. For purposes of this regulation, the Department has chosen to encourage voluntary adoption of pay-as-you-drive insurance by relying on market forces and incentives. For example, the regulations specifically authorize insurers to offer a discount to policyholders who participate in a verified mileage program.

The Department has amended the regulation to allow insurers to offer any of the following: (1) a traditional mileage estimation program, or (2) a verified mileage program, or (3) both a traditional mileage estimation program and a verified mileage estimation program. If an insurer offers both a traditional estimated mileage program and a verified mileage program, the insurer must offer all applicants and insureds both options. This approach has the benefit of making it possible for new auto insurers to enter the market and only introduce verified mileage programs. At the same time, this approach will keep mileage estimation options available to insureds.

- P. No Phased Implementation -- Some commenters have recommended that the Department implement pay-as-you-drive regulations in a phased manner. In some cases the items that commenters recommend for inclusion in subsequent phases are beyond the scope of this regulation. The Department believes that it is best to implement all aspects of this regulation at the same time. However, to the extent future regulations are adopted that further



implement pay-as-you-drive insurance in California, this set of regulations could be considered the first phase.

- Q. Comment Addresses Unchanged Language. -- This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. Or it is a comment directed at a portion of the regulations for which no changes were proposed during this public comment period. No response is, therefore, necessary. (Gov. Code § 11346.9(a)(3).)
- R. Cancellation, Rescission, Nonrenewal Issue -- Policy cancellation, rescission, and nonrenewal are controlled by various sections of the California Insurance Code and California Code of Regulations, including CIC §§ 650 through 674.9 and 1861.03, and CCR § 2632.19. These issues are addressed by the relevant statutory and regulatory provisions and are beyond the scope of this regulation.
- S. Exceeds Department's Authority -- The Department does not have clear authority to adopt this suggestion/recommendation.
- T. Price Per Mile Option Added -- The regulation as originally proposed in September 2008, did not include a price per mile option. The June 24 revision would have authorized insurers to offer a "price per mile" option and spelled out in some detail how a price per mile program could be implemented. Many members of the public commented on the price per mile provisions, questioning and/or criticizing the specific proposals. The current version of the regulations, released on July 31, 2009, removes the detailed provisions regarding price per mile programs but retains a broad and clear authorization for insurers to offer price per mile programs provided they comply with applicable laws, including, but not limited to, Proposition 103 and the notice provisions of CIC § 663 which requires insurers to provide notice before automobile insurance expires. Additionally, pursuant to the provisions of Proposition 103, an insurer seeking to provide a price per mile option must file an application with, and obtain approval of, the Commissioner before such a program may be implemented. Public notice of the filing of that application will be provided, the application is a public document, and (as for any Proposition 103 application) any interested member of the public may request a public hearing regarding the application. The Commissioner believes that insurers will be able to develop "price per mile" programs that comply with all applicable laws. The principal laws insurers must comply with are Proposition 103, Insurance Code § 663 (requiring that insurers provide notice before automobile insurance expires), and the Department's automobile rating factor regulations. However, detailed suggestions or recommendations regarding price per mile types of

programs, while not necessarily rejected, are not specifically being made part of this regulation.

- U. No Specific Response Required -- These comments provide introductory, summary, background, or general information. To the extent a response is required, it is included in the response to the more detailed comments submitted by the commenter. To the extent the comment is not specifically directed to particular regulatory provisions, a specific response is not required.
- V. Discount/Incentives -- The regulations allow an insurer to offer a discount for a mileage verification program under certain conditions. Specifically, to offer a discount for a mileage verification program the insurer must offer both a mileage estimation program and a verified actual mileage program. Any discount must be based on demonstrated lower costs associated with a verified mileage program savings, or from the ability to apply actuarial principles to more accurately rate verified mileage policies.

In addition, if an insurer offers a discount for participation in a verified mileage program, the discount must be made available to all policyholders in the verified actual mileage program. The discount does not necessarily have to be the same for all policyholders if multiple methods of verification are used and the insurer justifies a different discount based on the verification method. The ability to offer a discount should also operate as an incentive to insurers to offer mileage verification programs.

Further, the language of CCR § 2632.5(c)(2)(F)(iii) has been amended to make it clearer that, as with any discount, the insurer must demonstrate the basis for the discount. A discount that satisfies the above conditions is not a rating factor and does not present unfair discrimination issues in the specific context of this regulation.

- W. No Variance -- Some commenters indicated that there may be increased costs associated with offering a new verified mileage auto insurance program. These costs may be difficult to determine until data is available after verified mileage programs have been in place for some time. Some commenters urged the Department to create a new rate variance to account for these increased costs during the first few years. However the Department does not believe that the increased costs will be prohibitive or that they will require a variance.
- X. Rural Drivers. CIC § 1861.02 prescribes that the number of miles the policyholder drives annually is the second most important mandatory automobile rating factor. Nonetheless, some commenters expressed concern that rural drivers, who need to drive long distances for work, may be

penalized by verified mileage programs. Rural drivers generally have fewer accidents per mile because there are fewer intersections, less traffic congestion and so forth. The Department does not believe that rural drivers will necessarily be penalized for verified mileage programs. Insurers must still consider driving safety record (first mandatory rating factor) and years of driving experience (third mandatory rating factor) for every insured. They can also apply the optional rating factors of frequency and severity, both of which can reduce rates for drivers who live in relatively safe areas such as certain rural areas. Further, the Department expects that estimated mileage insurance programs will continue to be widely available in California for the foreseeable future.

- Y. Good Driver Discount Policy. The Statutory Good Driver Discount mandated by CIC § 1861.025 is not affected by this regulation. Any company that offers a verified mileage program under this regulation will have to comply with the good driver statutes and regulations. Further, under California law, including CIC § 1861.16(b), insurers that offer both estimated and verified mileage programs will have to offer both options to California statutory good drivers.
- Z. Unfair Discrimination. The fact that two policyholders may have different premiums even though, at the end of the policy period they have driven the same number of miles, is not necessarily unfairly discriminatory under CIC § 1861.02(4). For example, one policyholder has agreed to provide his or her verified actual miles and the other policyholder has simply agreed to provide the number of miles he or she expects to drive in the upcoming year. A policy is rated based upon the circumstances presented at policy issuance. A policyholder in a verified actual mileage program has agreed, at policy inception, to provide the insurer with the actual number of miles driven throughout the policy period. A policyholder in an estimated mileage program has not; that policyholder is rated based upon the miles the policyholder estimated he or she will drive in the upcoming policy period. In these precise circumstances, this is not unfair discrimination under CIC §1861.02(a)(4).
- AA. Same Class Plan. The regulation has been amended to clarify that both estimated mileage programs and verified mileage programs must be filed in the same class plan.
- BB. Sufficient Relationship to Original Publicly Noticed Regulation. Government Code § 11346.8(c) and Title 1 CCR § 42 authorizes a 15-day notice if the change is sufficiently related to the originally noticed regulation. Section 42 provides:

Changes to the original text of the regulation shall be deemed to be “sufficiently related,” as that term is used in Government Code Section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted.

The first page of the original Notice of Proposed Action for this rulemaking proceeding specifically included the following provision:

Although the proposed regulation text is limited to verification of mileage pursuant to the second mandatory rating factor, the Commissioner may consider additional changes relating to auto rating factors in this rulemaking. Potential changes to CCR section 2632.5 governing the other rating factors are expressly within the scope of this notice.

All of the changes in the final regulation, including allowing insurers to combine the second mandatory rating factor with other rating factors, are results that the public could have anticipated from the originally noticed action. Accordingly, they satisfy the applicable legal standards referenced above.